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SJC-13091

COMMONWEALTH vs. WILLIAM McDERMOTT.

Norfolk. May 5, 2021. - August 6, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Practice, Criminal, Sentence, Execution of sentence, Stay of proceedings.

Indictment found and returned in the Superior Court Department on November 30, 1981.

Following review by this court and the Appeals Court, a motion for a stay of execution of sentence, filed on October 27, 2020, was heard by Brian A. Davis, J.; and a second motion for a stay of execution of sentence was heard in the Appeals Court by James R. Milkey, J.

The Supreme Judicial Court granted an application for direct appellate review.

K. Hayne Barnwell for the defendant.

Michael McGee, Assistant District Attorney, for the Commonwealth.

David Rassoul Rangaviz, Committee for Public Counsel Services, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

CYPHER, J. The defendant, William McDermott, appeals from an order by a single justice of the Appeals Court denying his motion to stay the execution of his sentence pending his motion for a new trial.¹ We are concerned in this case with the effect a defendant's COVID-19 infection or vaccination may have when weighing the factors set forth in Commonwealth v. Nash, 486 Mass. 394, 407 (2020). In Nash, we held that COVID-19 concerns can buttress deficient motions to stay the execution of a sentence.² Id. at 405-406.

Background. On November 20, 1981, the seventeen year old defendant shot and killed the victim, Robert Kemp. On July 1, 1982, the defendant was convicted of murder in the first degree. He was sentenced to the statutory term of life imprisonment. We reduced the defendant's conviction to murder in the second degree on direct appeal pursuant to G. L. c. 278, § 33E.

¹ If a judge denies a defendant's motion to stay, the defendant may renew the request with a single justice, pursuant to Mass. R. A. P. 6 (b) (1), as appearing in 481 Mass. 1608 (2019). Commonwealth v. Nash, 486 Mass. 394, 410 (2020). The single justice may review either "as if ruling on the request for a stay in the first instance," or "to determine if the trial judge made an error of law or abused his or her discretion." Id. Under Mass. R. A. P. 6 (b) (3), "whichever side is aggrieved by the single justice's ruling may appeal . . . [to] the court on which the single justice sits." Nash, supra at 411-412. This court then may transfer those appeals, reviewing for error of law or abuse of discretion. Id. at 412.

² We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

Commonwealth v. McDermott, 393 Mass. 451, 459 (1984). The defendant filed a motion for a new trial in 2004, arguing that several of the jury instructions were erroneous. A Superior Court judge denied the motion, and the Appeals Court affirmed the denial of the motion. See Commonwealth v. McDermott, 65 Mass. App. Ct. 1112 (2006).

The defendant filed a second motion for a new trial on October 26, 2020, as well as a motion to stay the execution of his sentence, seeking release due to COVID-19 concerns. A Superior Court judge denied the motion to stay on January 13, 2021, holding that the defendant did not satisfy any of the Nash factors because the defendant (1) had no reasonable probability of success on appeal, (2) was a potential flight risk, and (3) already had contracted COVID-19 and therefore was no longer at risk.

The defendant then filed a motion to stay with a single justice in the Appeals Court, as allowed by Mass. R. A. P. 6 (b) (1), as appearing in 481 Mass. 1608 (2019). The single justice disagreed with the Superior Court judge on the first Nash factor, concluding that the defendant had a reasonable probability of success on appeal. However, the single justice agreed that the defendant was a flight risk and that COVID-19 concerns did not support a different result where the defendant already had contracted COVID-19 and been vaccinated against it.

The defendant appealed from the denial of his motion to stay execution of his sentence pending his motion for a new trial, and we granted his application for direct appellate review. The defendant argues that he meets all three Nash factors. He further argues that even if it is determined that one of the first two factors is deficient, a stay must still be granted under the third factor because the general COVID-19 risk remains high for incarcerated people and because the defendant's age and medical conditions put him at a high specific risk.

Discussion. The single justice of the Appeals Court recognized that the defendant could not bring a motion under rule 6 because he had no pending appeal. Rule 31 (a) of the Massachusetts Rules of Criminal Procedure, as appearing in 454 Mass. 1501 (2009), "does not authorize a judge to stay execution of a penal sentence when an appeal is not pending."

Commonwealth v. Charles, 466 Mass. 63, 74 (2013), quoting Commonwealth v. McLaughlin, 431 Mass. 506, 518 (2000).

Nonetheless, a judge has inherent power to stay a sentence pending a motion for a new trial in "exceptional circumstances."

Charles, supra. "The very concept of inherent power 'carries with it the implication that its use is for occasions not provided for by established methods.'" Commonwealth v. Boe, 456 Mass. 337, 345 n.13 (2010), quoting Brach v. Chief Justice of the Dist. Court Dep't, 386 Mass. 528, 536 (1982).

The single justice of the Appeals Court, without the benefit of Commonwealth v. Harris, 487 Mass. 1016, 1018 (2021), reviewed the motion for a stay under the exception set forth in Charles, 466 Mass. at 77 n.16. "Exceptional circumstances" are not specifically defined. In Charles, supra at 74, we concluded that the magnitude of the allegations of serious and far-reaching misconduct by Annie Dookhan at the William A. Hinton State Laboratory Institute constituted exceptional circumstance. However, in Harris, supra, we concluded that the COVID-19 pandemic itself does not present an exceptional circumstance warranting exercise of a judge's inherent power to grant a stay where a defendant files a motion for a new trial. Rather, a defendant must show that exceptional circumstances exist in his or her particular case. See id. at 1018-1019. As noted in Harris, supra, the pandemic, when combined with other factors, might present an exceptional circumstance in a particular defendant's case. See Pope v. Commonwealth, 487 Mass. 1014, 1016 (2021). Assuming, without deciding, that there are exceptional circumstances in this particular case, we consider the defendant's arguments.

It is unclear to us whether the single justice reviewed the judge's denial of the defendant's motion for a stay for abuse of discretion or under a de novo standard. See Nash, 486 Mass. at 410. We assume for purposes of this decision that he reviewed

the matter under the de novo standard. The single justice agreed with the reasoning of the motion judge that the motion should be denied because the defendant posed a serious flight risk in light of his life sentence, failure to obtain parole, and at least one previous escape attempt.³ The single justice also agreed with the motion judge that the risks posed by COVID-19 did not require the defendant's sentence to be stayed because he had already had COVID-19 and had been vaccinated. The single justice did not agree with the motion judge, however, that the defendant had not presented an issue worthy of appellate review. The single justice ventured no opinion on whether the issues raised were sufficiently strong to entitle the defendant to a new trial but did note that the defendant had made arguments of sufficient force to meet the first factor in Nash, whether he has presented an issue worthy of appellate review.

Without expressing an opinion on whether the issues raised by the defendant would entitle him to a new trial, we agree with the single justice that the issues were sufficient to meet the first factor in Nash.⁴ We also agree that the defendant presents a serious flight risk. See Commonwealth v. Hodge (No. 1), 380

³ The motion judge discounted evidence of a second attempted escape because, after investigating the incident, prison officials determined that no discipline was warranted.

⁴ The defendant argues that anti-gay rhetoric unfairly infected his trial.

Mass. 851, 855 (1980). Factors such as the possibility of flight to avoid punishment and the severity of the sentence imposed support this conclusion. See Nash, 486 Mass. at 405. We also consider the severity of the crime itself and whether the defendant poses a threat to the community. See id. at 414 ("the emphasis is primarily on the severity of the crimes"). Compare Commonwealth v. Dame, 473 Mass. 524, 539, cert. denied, 137 S. Ct. 132 (2016) (concluding judge did not abuse discretion in denying motion to stay execution of sentence based on security risk of defendant where defendant was convicted of brutally murdering victim), with Charles, 466 Mass. at 78-79 (defendant did not pose security risk where he was convicted of drug offenses and had participated in various programs offered in prison). Although we reduced the defendant's conviction to murder in the second degree, the severity of the offense goes without saying. See Commonwealth v. Okoro, 471 Mass. 51, 58 (2015). Furthermore, the defendant is still facing a life sentence.⁵ We disagree, however, that the fact that the

⁵ The defendant argues that the single justice did not consider positive factors, such as his release plan, his low-risk classification, or his work and programming efforts, in evaluating his risk of recidivism. These factors, although relevant, do not combat the security risk in this case, where no motion for a new trial has been allowed, the defendant has been denied parole repeatedly, and he has been convicted of murder in the second degree and sentenced to life imprisonment with the possibility of parole after fifteen years.

defendant had already contracted COVID-19 and had been vaccinated rendered the third factor, the risk of COVID-19, irrelevant. In Commonwealth v. Christie, 484 Mass. 397 (2020), we instructed that a judge considering a stay should weigh both the general risk of transmission to incarcerated people and prison staff as well as "the specific risk to the defendant, in view of his or her age and existing medical conditions." Id. at 401-402.

In Nash, we clarified that the aim of Christie was to reduce prison and jail populations to safer levels amidst the pandemic, not to introduce a new hurdle for defendants seeking stays. Nash, 486 Mass. at 406-408. Consideration of COVID-19 reduces incarceration rates by allowing judges to grant stays where "a defendant would not qualify for a stay under the traditional, two-factor test." Id. at 407. We recognize that "[e]veryone in a prison setting is at an increased risk [of COVID-19 exposure] due to the difficulty in maintaining physical distance from others and in spending time outdoors." Id. at 409. Therefore, although vulnerability to the virus may help a defendant qualify for a stay, a defendant's motion should not be hindered by a lack of special vulnerability. See id. Similarly, because COVID-19 case counts may change rapidly, the COVID-19 factor is not negated by a low or reduced level of cases at a certain facility. Id. at 408.

We do not wish to discourage inmates or detainees from consenting to vaccination. We also seek to reduce the inmate population where appropriate during the pandemic. We do not yet know whether a previous COVID-19 infection would provide the defendant with complete immunity or for how long. Although vaccinations have proved to be highly effective at protecting vaccinated people against symptomatic and severe COVID-19, breakthrough infections can occur and have occurred. We conclude, therefore, that whether a defendant previously has been infected or has been vaccinated should not be counted against the defendant when assessing the defendant's motion for a stay.

In any event, because we agree that the defendant presents a serious flight risk, we affirm the order the single justice of the Appeals Court denying the defendant's motion to stay his sentence pending appeal of his motion for a new trial. Nothing in this opinion precludes the defendant from moving for a stay of sentence in the event that his motion for a new trial is allowed.

So ordered.